No. 3072

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ILLINOIS SURETY COMPANY,
a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

Upon Writ of Error to the Southern Division of the United States District Court for the Northern District of California, Second Division.

JOHN W. PRESTON,
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Asst. United States Attorney,

Attorneys for Defendant in Error.

Filed this.....day of May, 1918.

FRANK B. MONCKTON, Clerk,

By....., Deputy Clerk.

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BRIEF OF THE DEFENDANT IN ERROR.

Plaintiff in Error seeks a reversal of the judgment on two grounds:

1. Insufficiency of the complaint, because of alleged fatal defects and omissions in the bond set out in the complaint.

2. That the evidence shows that the theatrical effects covered by the bond in suit did not come into the United States on the same vessel with Grazi, the manager of the opera company, and that said effects were not at the time of arrival in the actual possession of said manager, and that, therefore, the bond was absolutely void.

For the sake of convenience, counsel argue the second contention first, stating it on page seven of the brief as follows:

Theatrical Effects are Tools of Trade, and Must Come on the Very Same Vessel and at the Very Same Time as the Importer.

It is readily conceded that theatrical effects are "tools of trade, occupation, or employment", but the argument is fallacious and invalid for the reason that it fails to recognize the change in tariff laws beginning with the tariff act of August 27, 1894, paragraph 596, quoted in full on page 9 of the brief of counsel. In this law, for the first time, theatrical effects were specifically enumerated. Prior thereto theatrical effects were allowed to be imported under the same conditions that applied to all other "tools of trade, occupation, or employment", and if imported under those conditions, they were absolutely free; but the act of August 27, 1894, supra, in effect, prohibited the free importation of theatrical effects unless brought by proprietors or managers of theatrical exhibitions arriving from abroad for temporary use by them. That act further provided that the free importation of such articles should be under such regulations as the Secretary of the Treasury should prescribe and that bonds should be given for the payment to the United States of such duties as might be imposed by law upon any and all such articles as should not be exported within six months after the importation, and empowered the Secretary of the Treasury to extend the six months period for a further term of six months in case application should be made therefor.

The theatrical effects covered by the bond in question were imported under paragraph 656 of the tariff act of August 5, 1909, 36 Stat. at Large, page 78, and which contains the same provision as to theatrical effects as paragraph 596 of the act of August 27, 1894, but which differs therefrom as to other "tools of trade, occupation, or employment", in that the importers of such other "tools of trade, occupation, or employment" must be persons *emigrating* to the United States, a limitation which is absent from the act of August 27, 1894.

It is very clear that the law does not contemplate that *theatrical effects* should be "in the actual possession at the time of arrival of persons emigrating to the United States", for the reason that paragraph 656 prohibits free importation of such articles unless brought by proprietors or managers of theatrical exhibitions arriving from abroad for *temporary use* by them in such exhibitions and a proprietor or manager of a theatrical exhibition coming into the United States for temporary purposes only, is not an immigrant into the United States nor an emigrant from any other country.

Newton v. United States, 6 U. S. Court of Customs Appeals Reports, 503. The reasoning of counsel on page 14 is entirely correct as applied to "tools, implements, and instruments of trade, occupation, or employment", brought into the United States by an immigrant, that is, a person who has emigrated from

a foreign country to the United States, one of various reasons being that the owner has come into the United States for permanent residence. This reasoning and the law do not permit an individual member of a theatrical troupe to bring his costumes or other theatrical effects free of duty into the United States. The statute is so clear on this point that authority is unnecessary; but this construction was given in Treasury Decision 21973, February 3, 1900, where theatrical apparel imported by a member of a French Opera Company and not brought by the manager or proprietor thereof, was denied free entry.

One provision of the law relative to the importation of theatrical effects is that their importation shall be under such regulations as the Secretary of the Treasury may prescribe. In this case the regulations prescribed by the Secretary of the Treasury governing the importation are found in Articles 677 and 678 of the Customs Regulations of 1908. The general heading "Theatrical Effects" precedes Article 677. The theatrical effects embraced within the regulations must be brought by proprietors or managers of theatrical exhibitions arriving from abroad; they must be for temporary use by the proprietors or managers in such exhibitions; they must not be for any other person; they must not be for sale; they must have been used by said proprietors or managers abroad; and bond, conditioned on the payment of duties on such articles not exported within six

months after importation must be given. There is not the least inference that the goods must be in the actual possession of the proprietors or managers at the time of arrival. In this connection and in reply to counsel's argumentative question on page 14 of the brief, it is to be observed that the togas, swords and shields of Brutus, Cassius and Caesar are not entitled to free entry unless brought in by a proprietor or manager of a theatrical exhibition. Even the patriotic dagger of the "noblest Roman of them all" would be subject to duty if brought in otherwise than by a proprietor or manager of a theatrical exhibition for exhibition purposes and for temporary use. The decisions of the Board of General Appraisers and of the courts relied upon by counsel on this branch of the case concern importations prior to the tariff act of August 27, 1894.

THE BOND IS A VALID OBLIGATION.

Counsel contend that the bond is void, saying in that behalf:

1. That it does not contain an alternative condition to pay duty in lieu of the expressed condition for exportation. (Brief, page 27).
2. That it contains a restriction against exportation through any port but San Francisco. (Brief, page 37).
3. That as a common law obligation it has no

basis on which to rest and is without consideration. (Brief, page 42).

The bond is set out in full in the complaint on pages 3, 4 and 5 of the transcript. The original, on Catalogue Number 747, and printed in book form, is defendant's exhibit "A". The name of the corporate surety, Illinois Surety Company, was signed by Charles T. Hughes, its attorney in fact. The caption of the bond is BOND FOR REDELIVERY. The Number 158 on the upper right hand corner is the number of the bond and not the form number, as suggested by counsel on page 34. The penal sum of the bond is Six Thousand Dollars, to wit, double the estimated duty. The numbers 3000.00 and 6000.00 on the upper left hand part of the bond, are expressive, respectively, of the estimated duty and the double thereof. Mr. Charles T. Hughes testified (transcript, page 60):

> "My understanding of what the figures $3000.00 and $6000.00, in the upper left-hand corner of this bond are, is that the $3000.00 is the duty upon the valuation of the goods and the $6000.00 is double the duty, being the penalty of the bond."

He also testified (transcript, page 58):

> "This redelivery bond shows in my own writing the signature of the Illinois Surety Company."

He also testified (transcript, page 57):

"I am familiar with bonding in these matters. I have had about twenty years' experience."

On the face of the bond is endorsed the written consent of the surety to six months' extension.

It thus appears that it was thoroughly well understood by the Illinois Surety Company that the bond was given in pursuance of paragraph 656 of the Act of August 5, 1909, for the purpose of obtaining the admission free of duty for temporary use of the theatrical effects mentioned in the bond and that the bond was given for the payment to the United States of such duties (not to exceed $6000.00) on such articles as should not be exported within six months after importation. The alternative condition which counsel say is absent from the bond is really expressed in the first part of the bond wherein the principal and the surety are bound unto the United States of America in the sum of $6000.00, and the condition to export is the alternative, as expressed in the bond.

The estimate of duty was ridiculously poor for the evidence shows that the proper duty was $9,726.16 (transcript, page 31). It was stipulated (transcript, page 32) that a certain amount of the merchandise was exported, of the value of $5,852.00, upon which the duty was $3,617.34. This exportation was a performance pro tanto of the conditions to export, and operated as a duty credit of $3,617.34 against the total duty of $9,726.16, and left a balance of $6,108.82 due as duty on the goods not exported, or $108.82 in

excess of the amount nominated in the bond, to wit, $6,000.00, and therefore judgment was given for only $6,000.00

The claim that the bond contains a restriction againts exportation through any port but San Francisco is utterly groundless. It does contain the condition to redeliver the goods to the Collector of San Francisco for export and the final condition that the principal "shall enter the said effects for exportation from the United States within six months in the manner prescribed by law and the Regulations of the Treasury Department." This means that the goods must be redelivered to the Collector at the port of importation in order that they may be examined and identified as being the goods that were imported and covered by the bond but the condition to export is general, that is, the goods may be exported "from the United States" at any port or ports.

Counsel suggest (brief, page 33) that the form of bond that should have been used was prescribed by Treasury Decision 31999. In this respect it is to be noticed that this Treasury Decision was dated November 11, 1911, the date on which the bond was executed, and therefore of course the regulations therein promulgated could not have reached San Francisco from Washington in time to be used in this transaction. The Treasury Decision cited contains a great many provisions in addition to the new form of bond. Paragraph 7, page 504, Volume 21,

in referring to the various classes of merchandise, provides that merchandise so entered may be exported either at the port of entry or at any other port, except railroad iron for repair or remanufacture and machinery for repair, which must be exported at the same port at which imported, and that before exportation is made, the importer should file an application for the examination of the merchandise for exportation, stating where and when the merchandise may be examined for identification. These regulations promulgated in Treasury Decision 31999 were amended or modified by a new set of regulations in Treasury Decision 33806 and a slightly different form of so-called "Special Six Months' Bond for Exportation" was prescribed (page 285, Vol. 25). On page 287, Volume 25, is a regulation superseding paragraph 7 of Treasury Decision 31999, namely, paragraph 10, which provides that merchandise (this includes theatrical scenery, property and apparel mentioned in paragraph 6 on page 286) so entered, may be exported either at the port of entry or at another port and shall be delivered by the importer for examination, either at the appraiser's store or at such other place as the Collector may designate. It also requires that an application, substantially in a form prescribed, shall be filed with the Collector in sufficient time in advance of the departure of the exporting conveyance to permit examination of the merchandise. The application recites, among other

things, that the merchandise will be delivered for identification either at the appraiser's store or at such other place as the Collector may designate.

The regulations of the Treasury Department, contained in Treasury Decision 31999 and Treasury Decision 33806 are referred to here for the purpose of showing that the provision in the bond in suit for redelivery to the Collector of San Francisco, the port of importation, is legal, and because of the purpose of paragraph 656 of the Act of August 5, 1909, was entirely proper and necessary. If the Treasury Department had the power to make these regulations requiring redelivery of the merchandise to the Collector, it had the power to insert such requirement in the bond. (Cat. No. 747). Certainly no one will contend that this provision of the tariff should be administered by the officers of the Government so as to permit a manager of a theatrical exhibition to satisfy the condition in the bond to export, unless the articles sought to be exported were identified by the officers at the port of importation as being the articles that were imported and covered by the bond.

Treasury Decision 29939 promulgated August 6, 1909, the next day after the tariff law was enacted, consists of instructions for guidance of officers of the customs, extending the then existing regulations prescribed under the tariff act of July 24, 1897 and other acts to importations under the Act of August 5, 1909, and is pertinent here, in that on page 63 of

Volume 18, Articles 677 and 678 Customs Regulations of 1908, are extended to theatrical effects under paragraph 656. This had the effect to continue the use of the form of bond (Cat. No. 747) used in this case. In favor of its validity there is the presumption that a public official has performed his duty. Therefore, the form was used by the Collector of Customs under instructions from the Secretary of the Treasury, who was empowered by paragraph 656 to make regulations. If the provision in the bond for redelivery is beyond the scope of the statute the worst that can be said of it is that it is surplusage and not binding, but it can not render invalid those stipulations that are in consonance with the statute.

United States v. Dicerhoff, 202 U. S. 302.

Lowe vs. City of Guthrie, 44 Pac. Rep. 198.

As the bond is a statutory bond any defects therein are cured by reading into it the provisions of the Statute (paragraph 656 Act of Aug. 5, 1909), for the protection of the public.

Brandt Suretyship and Guaranty

Third Edition, section 105.

The technical objection to the form of the bond is not well founded but if it were it would not save this corporate compensated surety from the judgment. A compensated surety unlike the private or friendly surety can not invoke the principle, *strictissimi juris.* Spencer on Suretyship, Sec. 93.

Counsel for plaintiff in error in his statement of

the case (Tr. pp. 2-3) says "the bond in question was not for the payment of duties or for the exportation of the goods but simply for their exportation", and further states that neither on the trial nor in the judgment or opinion of the Court below was the case treated as being for duties, but simply an action on the bond. The facts and law are both in contradicton of the above statements.

The complaint (Tr. pp. 2-3) alleges the section of the Act under which the bond is to be executed. In pursuance of the said section of the act the bond was executed, and is fully set out in the complaint. If it is defective in form because it did not recite that the obligor shall pay to the United States such duties as may be imposed by law upon any and all such articles as shall not be exported, it was cured by the act itself.

The pleadings, the evidence in the case, and the opinion of the court clearly show that the defendant in error was seeking to recover the unpaid duty on the effects not exported as damages for the breach of contract. The judgment of the lower court was in accordance with this view, and no doubt from the opinion of the court the full amount as prayed for in the complaint would have been given, if the amount had not been limited by the contract.

THE BOND IS A VALID COMMON LAW OBLIGATION.

If perchance plaintiff in error can escape liability under the statutory bond, it becomes immovably impaled upon the other horn of the dilemma and is liable upon the bond as a voluntary or common law obligation. If counsel's narrow reading of the bond is to be accepted, it contains a condition to export the merchandise described therein within six months with the obligation upon the surety to pay the United States of America $6,000.00 for breach of the condition. The consideration for the bond was the delivery of the merchandise to the principal without payment of duty thereon, the said duty being $9,726.16. (Testimony of C. L. Marple, transcript, page 31).

It is well settled that a bond not prescribed by law but voluntarily given to the United States is a valid obligation.

United States vs. Fausto Mora, U. S. 97, p. 413,

United States vs. Hodson, 77 U. S. 937,

Jessup vs. United States, 106 U. S. 147,

Illinois Surety Co. vs. United States, 229 Fed. Rep. 527,

Moses vs. United States, 166 U. S. 571.

As a voluntary bond, the recovery thereon should be for the full amount regardless of actual loss sustained as a result of the breach because it is a bond running to the Government.

Illinois Surety Company, supra, at page 531.

In this case it does not make any difference which of the two rules of damages is applied because recovery is limited to the sum of $6,000.00 in either event.

It is respectfully submitted that the judgment should be affirmed.

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